Case 2:15-cv-09332-SJO-JEM Document 68-2 Filed 04/03/17 Page 1 of 29 Page ID

	#:109	96
1 2	business as DERBYWARS, and DOES 1 ) through 10, inclusive,	
3	Defendants.	
4	)	
5		
6		
7	Plaintiffs Los Angeles Turf Club, Inc	orporated, Los Angeles Turf Club II, Inc.,
8	Pacific Racing Association, Pacific Racing	Association II, Gulfstream Park Racing
9	Association, Inc., Oregon Racing, Inc., Mar	yland Jockey Club Of Baltimore City, Inc.,
10	and Laurel Racing Association, Inc. (collect	tively, "Plaintiffs"), respectfully submit the
11	following Statement of Genuine Disputes of Material Facts in support of their	
12	Opposition to Defendant's Motion for Summary Judgment:	
13	I. DEFENDANT'S CLAIMED UNDISPUTED FACTS	
14	A Defendant's Claimed Undianute	d Foots Allogadly Domonstrating That
15	Plaintiffs' First Cause Of Action For Alle	d Facts Allegedly Demonstrating That eged Violation Of The <i>Interstate</i>
16	Horseracing Act Fails As A Matter Of La	W
17		
18		DI AININEEC DECRONICE
19	DEFENDANT'S FACTS AND	PLAINTIFFS' RESPONSE
20	EVIDENCE	
21	1. Plaintiffs Los Angeles Turf Club, Inc., Los Angeles Turf Club II, Inc., Pacific	1. Undisputed.
	Racing Association, Pacific Racing	
22	Association II, Gulfstream Park Racing	
23	Association, Inc., Oregon Racing Inc.,	
24	Maryland Jockey Club of Baltimore City, Inc., and Laurel Racing Association, Inc.	
25	(collectively, "Plaintiffs") operate horse	
26	racing meets at six race tracks located in	
27	California, Oregon, Maryland and Florida. Docket No. 31 ("FAC") ¶¶ 3-10;	

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28

Declaration of Matthew P. Kanny

("Kanny Decl.") ¶ 2, Ex. A ("Daruty

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1	Dep.") at 121:9-17; Declaration of Maura	
$_{2}\parallel$	K. Gierl ("Gierl Decl.") ¶ 3, Ex. B	
	("Rogers Dep.") at 35:5-12, 36:5-11.	
3	2. Plaintiffs are all licensed to offer pari-	2. Undisputed.
4	mutuel wagering on horse races at their	
	tracks. Kanny Decl. ¶ 4, Ex. C ("Ritvo	
5	Dep.") at 52:6-55:23; Rogers Dep. at	
6	59:22-60:23; Daruty Dep. At 375:10-	
	377:16, 382:11-388:4.	
7	3. Plaintiffs' race tracks accounted for	3. Undisputed.
8	about \$3 billion in "handle" in each of	
	2015 and 2016. Daruty Dep. At 363:23-	
9	364:5, 409:8-24; Gierl Decl. ¶ 2, Ex. A	
10	("Confidential Ritvo Dep.") at 85:12-	
_	86:17; Rogers Dep. At 36:12-37:8.	
11	4. The total handle at all race tracks in	4. Undisputed.
12	the United States was about \$10 billion	
12	in each of 2015 and 2016. Daruty Dep.	
13	At 363:23-364:5, 409:8-24; Confidential	
14	Ritvo Dep. at 85:12-86:17; Rogers Dep.	
15	at 36:12-37:8.	
13	5. Plaintiffs are all wholly owned by	5. Undisputed.
16	TSG Developments Investments, Inc.	
17	(hereafter, the "Stronach Group").	
1	Daruty Dep at 121:9-17, 126:6-11;	
18	Rogers Dep. at 32:16-36:11.	
19	6. The Stronach Group owns, directly or	6. Undisputed.
	indirectly, Monarch Content	
20	Management ("Monarch"), a simulcast	
21	purchase and sales agent for numerous	
	racetracks and wagering outlets;	
22	XpressBet, an Advanced Deposit	
23	Wagering ("ADW") service provider that	
	allows customers to place pari-mutuel	
24	wagers via internet or telephone; Elite	
25	Turf Club, an ADW that caters to high	
<u>,  </u>	volume, computer assisted pari-mutuel	
26	wagering ("CAW"); and AmTote, a	
27	provider of totalizator services.	
20	Daruty Dep. at 68:8-12; 71:16-72:23;	
28	121:18-122:16, 127:22-128:18; Rogers	

1	Dep. at 32:7-43:17.	
2	7. Defendant HRL formed in 2009.	7. Undisputed.
3	Kanny Decl. ¶ 3, Ex. B ("Midland Dep.")	7. Ondisputed.
4	at 44:7-10; Declaration of Mark Midland	
5	("Midland Decl.") at ¶ 6.	
	8. In 2009, HRL launched Horse Racing Nation ("HRN"), a free online	8. Undisputed.
6	community for horse racing fans.	
7	Midland Dep. at 44:7-46:4; Midland	
8	Decl. ¶ 6.	O Disputed that these are fortest some
9	9. In October 2011, HRL launched Derby Wars, a website that offers free and pay-	9. Disputed that these are fantasy games of skill. These are based upon the
10	to-play horse racing fantasy games of	outcome of real sporting events, so not a
11	skill. Midland Dep. at 69:14-19, 72:3-74:25; Midland Decl. ¶ 7.	fantasy event, and "games of skill" is an undefined (or recognized) term.
12		Declaration of Diane L. Ellis ("Ellis
13		Dec."), ¶ 8. <u>Docket</u> No. 62-7; Declaration of Diane L. Ellis in
14		Opposition to Motion for Summary
15		Judgment, ("Ellis Dec. Opp. to MSJ"), ¶
		3, Exh. A, Midland Depo., 180:16- 181:21.
16	10. The amount a person may wager on	10. Undisputed.
17	horse races under a pari-mutuel wagering	1
18	system generally is not fixed in advance	
19	and can vary. Daruty Dep. at 84:15-85:11, 87:7-13; Ritvo Dep. at 60:6-62:11;	
20	Midland Decl. ¶ 51.	
21	11. The payout on bets on horse races in	11. Disputed. Exchange wagering is a
22	a pari-mutuel wagering system generally	form of pari-mutuel wagering, with none
	is determined by the size of the wagering pool, which can fluctuate depending on	of those characteristics. (see California <i>Business &amp; Professions Code</i> §19604.5)
23	the number and amount of pari-mutuel	Dusiness & Frojessions Code §19004.3)
24	wagers placed, and the wagering odds,	
25	which can change up to the time the	
26	race closes. Daruty Dep. at 85:12-16, 85:22-86:2, 87:7-13; Ritvo Dep. at	
27	52:6-55:23; Midland Decl. ¶ 51.	
28	12. The "host" track on horse races in a	12. Undisputed.
	pari-mutuel wagering system generally	

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1	retains a specified fixed percentage of the	
2	wagers (called the "take-out") before it	
3	pays out money to the winners of the bets on a particular race. Daruty Dep. at	
	87:14-25; Ritvo Dep. at 52:6-55:23,	
4	56:2-57:8; Midland Decl. ¶ 51.	
5	13. Players entering Derby Wars' pay-to-	13. Undisputed.
6	play contests pay a fixed entry fee in	
7	exchange for the opportunity to	
	participate in the contests. Midland Dep.	
8	at 192:17-193:14; Midland Decl. ¶ 13.  14. The fixed entry fee is set in advance	14 Undisputed
9	and does not change, and every player	14. Undisputed.
10	pays the same entry fee in a given	
	contest. Midland Dep. at 192:17-193:14;	
11	Midland Decl. ¶ 14.	
12	15. The entry fee also provides contest	15. Disputed that this is dependent upon
13	participants with access to additional	the payment of an entry fee. Every
	services, such as an online chat	visitor to the Derby Wars website has
14	feature, a leaderboard, a display of other	access to the leaderboards, a display of
15	participants' selections, and a graphic	other participants' selections, and a
16	that displays how many people selected each horse. Midland Dep. at 76:11-25,	graphic that displays how many people selected each horse, without paying an
17	125:2-127:13; Midland Decl. ¶ 15.	entry fee. Ellis Dec. Opp.to MSJ, ¶ 7.
		endy fee. Ems Bee. oppio Mass,    7.
18	16. In January 2015 (prior to filing this	16. Disputed. Ellis Dec. Opp.to MSJ, ¶
19	action), Stronach Group executive Scott	5, Exh. C, Deposition of Scott Daruty,
20	Daruty (a lawyer) referred to Derby	439:12-22; 440:16-441:12.
	Wars' contests as non-pari-mutuel.	
21	Daruty Dep. at 439:5-441:16.  17. The contests consist of a number of	17. Undisputed.
22	specified contest races (usually a	17. Chaispatea.
23	minimum of six races in each contest) to	
	be run at various horse racing tracks	
24	across the United States. Midland Dep. at	
25	151:25-152:12, 155:18-156:3;	
26	Midland Decl. ¶ 10.	10 Undiameted
27	18. Players entering a contest select one horse for each designated race in the	18. Undisputed.
	contest, along with a backup if that	
28	horse scratches. Midland Decl. ¶ 10.	

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1	19. After the race, Derby Wars computes	19. Undisputed.
2	a point score for each player's pick.	-
	Midland Dep. at 134:6-135:20;	
3	Midland Decl. ¶ 12.	20 D: 4 14 44 : 4 1 1
4	20. The points allocated to each player is	20. Disputed that the points are based on "mythical dellar[a]". The points are
5	based on one point per mythical dollar of payout at the track, subject to	"mythical dollar[s]". The points are based on the actual payouts at the track.
	maximum caps set according to the	Ellis Dec. Opp. to MSJ, ¶ 3, Exh. A,
6	contest's rules. Midland Dep. at	Deposition of Mark Midland, 135:21-24;
7	134:6-135:20; Midland Decl. ¶ 11.	180:16-22.
8	21. After all races have been run, the	21. Undisputed.
9	players with the highest point scores win	
9	the prize. Midland Dep. at 175:11-	
10	176:10, 180:12-14; Midland Decl. ¶ 12.	22 Undisputed
11	22. Like the entry fees, the prizes awarded to the winner of each contest are	22. Undisputed.
12	set in advance and do not change.	
	Midland Dep. at 192:17-193:14;	
13	Midland Decl. ¶ 14; Daruty Dep. at	
14	94:15-24.	
15	23. The prizes are awarded to the player	23. Undisputed.
	who achieves the highest score in the game, and the prizes awarded are	
16	the same regardless of the number of	
17	points scored. Midland Dep. at 175:11-	
18	176:10, 180:12-14, 192:17-193:14;	
19	Midland Decl. ¶ 16.	
	24. The prize for each contest is not	24. Disputed. Derby Wars pays the
20	made up of monies collected from entry	prizes, and Derby Wars' only source of
21	fees paid by contest participants.  Midland Decl. ¶ 16.	revenue is entry fees. Ellis Dec. Opp.to MSJ, ¶ 4, Exh. B, Deposition of Mike
22	Midiand Deci.    10.	Shutty, 21:17-22.
	25. There are three general formats of	25. Undisputed.
23	Derby Wars' fantasy horse racing	1
24	contests, each subject to contest	
25	rules: (i) Open, (ii) Lockdown, and (iii)	
	Survivor. Midland Decl. ¶ 18.	26 Hadianatad
26	26. In Open contests, players can change their picks up until the race closes.	26. Undisputed.
27	Midland Dep. at 132:12-22; Midland	
28	Decl. ¶ 19.	
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1	27. In Lockdown contests, players must	27. Undisputed.
2	make all of their selections before the	
	start of the first race. Midland Dep. at	
3	132:23-25; Midland Decl. ¶ 20.	
4	28. Open and Lockdown contests	28. Undisputed.
5	comprise the majority of contests run by	
3	Derby Wars. Midland Decl. ¶¶ 19-20.	20 11 11 11
6	29. In the Survivor format, players must	29. Undisputed.
7	pick a horse that finishes first, second or	
	third in each race in order to advance to	
8	the next race. Midland Decl. ¶ 21.	20 Undignuted
9	30. Predetermined prizes in Survivor contests are awarded to the players who	30. Undisputed.
10	survive to the end of the contest.	
10	Midland Decl. ¶ 21.	
11	31. Skill predominates over chance in	31. Disputed. See, Objections to Kanny
12	Derby Wars' contests. Kanny Decl. ¶ 6,	Decl., and to the excerpts of the Heeb
	Ex. E (Expert Report of Randal Heeb,	Report. Further this is not a fact, but an
13	Ph.D. ("Heeb Rep.")) ¶¶ 1- 22.	unsupported opinion.
14		
1.5	32. Derby Wars designed its contests to	32. Disputed. Misstates the testimony.
15	maximize the skill required to win.	None of the cited deposition testimony
16	Midland Dep. at 21:12-22:8, 69:14-19,	supports that statement of fact. Midland
17	130:11-131:4, 136:22-137:4, 138:9-	Decl., ¶ 22 states: "When we designed
	139:20, 141:16- 25, 198:7- 199:14;	Derby Wars' contests, we designed them
18	Midland Decl. ¶ 22.	to involve a substantial amount of skill."
19	33. Derby Wars' contests involve intra-	33. Disputed. See, objections to Kanny
	game strategy skills, where players may	Decl., and to the excerpts of the Heeb
20	adjust their selections to take best	Report. Further this is not a fact, but an
21	advantage of the relative probabilities of winning relative to the scores of their	unsupported opinion. That is not true in Lockdown games, where picks are made
22	opponents. Heeb Rep. ¶¶ 14, 32-33.	all at once, such that there is no intra-
	opponents. Heeb Kep.    14, 32-33.	game strategy (see Derby Wars' Fact 27
23		above).
24		<i>'</i>
	34. Derby Wars' contests also involve	34. Disputed. See, Objections to Kanny
25	the skill of anticipating the overall slate	Decl., and to the excerpts of the Heeb
26	of races that is likely to yield a high or	Report. Further this is not a fact, but an
27	low scoring game, and to predict the	unsupported opinion.
	score likely necessary to win. Heeb Rep.	
28	¶¶ 15, 34.	
	-7-	

1	35. Derby Wars' contests also involve	35. Disputed. See, Objections to Kanny
2	the skill of evaluating opponents to	Decl., and to the excerpts of the Heeb
	determine their tendencies and	Report. Further this is not a fact, but an
3	relative strengths and weaknesses.	unsupported opinion.
4	Heeb Rep. ¶¶ 16, 35.  36. Winning outcomes in Derby Wars'	36. Disputed. See, Objections to Kanny
5	contests reflect the relative knowledge	Decl., and to the excerpts of the Heeb
6	and skill of the participants, and participants earn points based on	Report. Further this is not a fact, but an unsupported opinion. Winning
7	accumulated statistical results of the	outcomes are determined by the results
8	performance of horses in multiple real	of the horse races, uncertain events in
	world horse racing events, subject to	which the player has no control over the
9   10	proprietary caps. Heeb Report ¶¶ 10-22.	outcome. Ellis Dec. Opp.to MSJ, ¶ 3, Exh. A, Deposition of Mark Midland,
11		177:21-178:13; 211:5-17. Further, the points are not based on statistical results,
12		but instead the actual results of a real
13		sporting event. Ellis Dec. Opp. to MSJ,
14		¶ 3, Exh. A, Deposition of Mark Midland, 180:16-181:21.
15	37. Participating in – and winning –	37. Disputed. See, Objections to Kanny
16	Derby Wars' contests involves applying	Decl., and to the excerpts of the Heeb
17	a variety of skills, including knowledge of horse racing, knowledge of the horses	Report. Further this is not a fact, but an unsupported opinion. Winning is based
18	in a given race, and the ability to	on the outcome beyond the control (or
	handicap performance of the horse based	influence) of the Player. Ellis Dec.
19	on a variety of factors such as weather,	Opp.to MSJ, ¶ 3, Exh. A, Deposition of
20	prior performance, the particular jockey	Mark Midland, 211:5-17; Ellis Dec.
21	riding the track, and the track. Heeb Report ¶ 31.	Opp.to MSJ, ¶ 4, Exh. B, Deposition of Mike Shutty, 66:4-11.
22	38. Plaintiffs admit that the Interstate	38. Disputed. Misstates testimony of
	Horse Racing Act applies only to pari-	Ritvo; and contrary to terms of the
22 H	Horse reaching rice applies only to pair	
23	mutuel wagers. Ritvo Dep. at 52:6-	Interstate Horseracing Act which is not
23 24		Interstate Horseracing Act which is not limited to pari-mutuel wagers. 15
	mutuel wagers. Ritvo Dep. at 52:6-	Interstate Horseracing Act which is not
24	mutuel wagers. Ritvo Dep. at 52:6-	Interstate Horseracing Act which is not limited to pari-mutuel wagers. 15
<ul><li>24</li><li>25</li><li>26</li></ul>	mutuel wagers. Ritvo Dep. at 52:6-55:23, 66:1-12.  39. Jockeys typically are engaged by horse trainers to ride in races and work	Interstate Horseracing Act which is not limited to pari-mutuel wagers. 15 U.S.C. §3002(3).
24 25 26 27	mutuel wagers. Ritvo Dep. at 52:6-55:23, 66:1-12.  39. Jockeys typically are engaged by horse trainers to ride in races and work with many different trainers and ride	Interstate Horseracing Act which is not limited to pari-mutuel wagers. 15 U.S.C. §3002(3).
<ul><li>24</li><li>25</li><li>26</li></ul>	mutuel wagers. Ritvo Dep. at 52:6-55:23, 66:1-12.  39. Jockeys typically are engaged by horse trainers to ride in races and work	Interstate Horseracing Act which is not limited to pari-mutuel wagers. 15 U.S.C. §3002(3).

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1	Dep. at 18:15-21:9, 22:17-23:9; Daruty	
2	Dep. at 91:19-92:7.	
3	40. Bet America does not pay additional	40. Disputed. Bet America does not pay
	compensation to Plaintiffs for use of their tracks in Bet America's contests, because	additional compensation because it already pays Plaintiffs for the use of
4	there is not yet an established business	their races. Ellis Dec. Opp.to MSJ, ¶ 5,
5	model on contest play. Daruty Dep. at	Exh. C, Deposition of Scott Daruty,
6	42:10-45:22; 201:11-202:6.	43:23-44:21.
	41. Plaintiffs and Bet America currently	41. Disputed. Ellis Dec. Opp.to MSJ, ¶
7	do not have a compensation model in	5, Exh. C, Deposition of Scott Daruty,
8	place for use of Plaintiffs' tracks	43:23-44:21.
9	in Bet America contests. Daruty Dep. at 354:8-21.	
10	42. Horse Tourneys, a pure contest site	42. Disputed. Horse Tourneys is
	that does not offer ADW pari-mutuel	licensed as an ADW. Ellis Dec. Opp.to
11	wagering, operates contests using	MSJ, ¶ 5, Exh. C, Deposition of Scott
12	Plaintiffs' tracks without any payment to Plaintiffs. Daruty Dep. at 38:9-39:3,	Daruty, 228:8-15.
13	248:4-254:6, 262:12-264:11.	
14	43. ADW licenses issued by the NDRC	43. Disputed. See, Objections to
15	do not cover fantasy horse racing	Declaration of Mark Midland. This
13	contests, as NDRC does not treat	statement is without foundation and is
16	contests as pari-mutuel wagering.	speculation.
17	Midland Decl. ¶ 53.	
18		
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28		
	_9-	
	PLAINTIFFS' STATEMENT OF	F GENUINE DISPUTES OF MATERIAL FACTS

B. Defendant's Claimed Undisputed Facts Allegedly Demonstrating That Plaintiffs' Second Cause Of Action For Alleged Violation Of California *Business* & *Professions Code* Sections 17200, *et seq.*, Fails As A Matter Of Law

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DEFENDANT'S EACTS AND	PLAINTIFFS' RESPONSE
DEFENDANT STACTS AND	FLAINTIFFS RESPONSE
EVIDENCE	
1. Plaintiffs Los Angeles Turf Club, Inc., Los Angeles Turf Club II, Inc., Pacific	1. Undisputed.
Association II, Gulfstream Park Racing	
Association, Inc., Oregon Racing Inc.,	
Maryland Jockey Club of Baltimore City,	
Inc., and Laurel Racing Association, Inc. (collectively, "Plaintiffs") operate horse	
racing meets at six race tracks located in	
California, Oregon, Maryland and	
11	
11 ' " '	
	2. Undisputed.
11	F
tracks. Kanny Decl. ¶ 4, Ex. C ("Ritvo	
Dep.") at 52:6-55:23; Rogers Dep. at	
59:22-60:23; Daruty Dep. At 375:10-	
377:16, 382:11-388:4.	
	3. Undisputed.
• • • • • • • • • • • • • • • • • •	
	4 TT 1: 1
4. The total handle at all race tracks in the United States was about \$10 billion	4. Undisputed.
in each of 2015 and 2016. Daruty Dep.	
	1. Plaintiffs Los Angeles Turf Club, Inc., Los Angeles Turf Club II, Inc., Pacific Racing Association, Pacific Racing Association, Inc., Oregon Racing Inc., Maryland Jockey Club of Baltimore City, Inc., and Laurel Racing Association, Inc. (collectively, "Plaintiffs") operate horse racing meets at six race tracks located in California, Oregon, Maryland and Florida. Docket No. 31 ("FAC") ¶¶ 3-10; Declaration of Matthew P. Kanny ("Kanny Decl.") ¶ 2, Ex. A ("Daruty Dep.") at 121:9-17; Declaration of Maura K. Gierl ("Gierl Decl.") ¶ 3, Ex. B ("Rogers Dep.") at 35:5-12, 36:5-11.  2. Plaintiffs are all licensed to offer parimutuel wagering on horse races at their tracks. Kanny Decl. ¶ 4, Ex. C ("Ritvo Dep.") at 52:6-55:23; Rogers Dep. at 59:22-60:23; Daruty Dep. At 375:10-377:16, 382:11-388:4.  3. Plaintiffs' race tracks accounted for about \$3 billion in "handle" in each of 2015 and 2016. Daruty Dep. At 363:23-364:5, 409:8-24; Gierl Decl. ¶ 2, Ex. A ("Confidential Ritvo Dep.") at 85:12-86:17; Rogers Dep. At 36:12-37:8.  4. The total handle at all race tracks in the United States was about \$10 billion

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At 363:23-364:5, 409:8-24; Confidential Ritvo Dep. at 85:12-86:17; Rogers Dep. at 36:12-37:8.  5. Plaintiffs are all wholly owned by TSG Developments Investments, Inc. (hereafter, the "Stronach Group"). Daruty Dep at 121:9-17, 126:6-11; Rogers Dep. at 32:16-36:11.  6. The Stronach Group owns, directly or indirectly, Monarch Content Management ("Monarch"), a simulcast purchase and sales agent for numerous	
at 36:12-37:8.  5. Plaintiffs are all wholly owned by TSG Developments Investments, Inc. (hereafter, the "Stronach Group"). Daruty Dep at 121:9-17, 126:6-11; Rogers Dep. at 32:16-36:11.  6. The Stronach Group owns, directly or indirectly, Monarch Content Management ("Monarch"), a simulcast	
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7   indirectly, Monarch Content 8   Management ("Monarch"), a simulcast	
Management ("Monarch"), a simulcast	
purchase and sales agent for numerous	
macetracks and wagering outlets,	
XpressBet, an Advanced Deposit	
Wagering ("ADW") service provider that	
anows customers to place pari-mutuel	
wagers via internet or telephone; Elite	
Turf Club, an ADW that caters to high	
volume, computer assisted part-mutuer	
wagering ("CAW"); and AmTote, a	
provider of totalizator services.  Daruty Dep. at 68:8-12; 71:16-72:23;	
101 10 100 16 107 00 100 D	
16     121:18-122:16, 127:22-128:18; Rogers   Dep. at 32:7-43:17.	
17	
7. Defendant HRL formed in 2009. 7. Undisputed.	
Kanny Decl. ¶ 3, Ex. B ("Midland Dep.")	
19    at 44:7-10; Declaration of Mark Midland	
20 ("Midland Decl.") at ¶ 6.	
8. In 2009, HRL launched Horse Racing 8. Undisputed.	
Nation ("HRN"), a free online	
22 community for horse racing fans.	
Midland Dep. at 44:7-46:4; Midland	
Deci. ¶ 6.	
24 9. In October 2011, HRL launched Derby 9. Disputed that these are fantasy	_
Wars, a website that offers free and pay- of skill. These are based upon the	
to-play horse racing fantasy games of outcome of real sporting events, s	
skill. Midland Dep. at 69:14-19, 72:3- fantasy event, and "games of skill."	
74:25; Midland Decl. ¶ 7. undefined (or recognized) term.	
Dec., ¶8; Ellis Dec. Opp. to MSJ,	
28 Exh. A, Midland Depo., 180:16-1	81:21.

1	10. The amount a person may wager on	10. Undisputed.
2	horse races under a pari-mutuel wagering system generally is not fixed in advance	
3	and can vary. Daruty Dep. at 84:15-	
4	85:11, 87:7-13; Ritvo Dep. at 60:6-62:11; Midland Decl. ¶ 51.	
5	11. The payout on bets on horse races in	11. Disputed. Exchange wagering is a
6	a pari-mutuel wagering system generally	form of pari-mutuel wagering, with none
7	is determined by the size of the wagering pool, which can fluctuate depending on	of those characteristics. (see California <i>Business &amp; Professions Code</i> §19604.5)
$_{8} \parallel$	the number and amount of pari-mutuel	Business & Projessions Code §17004.5)
9	wagers placed, and the wagering odds,	
10	which can change up to the time the race closes. Daruty Dep. at 85:12-16,	
11	85:22-86:2, 87:7-13; Ritvo Dep. at 52:6-55:23; Midland Decl. ¶ 51.	
12	12. The "host" track on horse races in a	12. Undisputed.
13	pari-mutuel wagering system generally	12. Chaispatea.
14	retains a specified fixed percentage of the wagers (called the "take-out") before it	
15	pays out money to the winners of the bets	
	on a particular race. Daruty Dep. at	
16	87:14-25; Ritvo Dep. at 52:6-55:23,	
17	56:2-57:8; Midland Decl. ¶ 51.	10 11 1
18	13. Players entering Derby Wars' pay-to- play contests pay a fixed entry fee in	13. Undisputed.
19	exchange for the opportunity to	
20	participate in the contests. Midland Dep. at 192:17-193:14; Midland Decl. ¶ 13.	
$_{21} \parallel$	14. The fixed entry fee is set in advance	14. Undisputed.
	and does not change, and every player	- 1. C
22	pays the same entry fee in a given	
23	contest. Midland Dep. at 192:17-193:14;	
24	Midland Decl. ¶ 14.	
25	15. The entry fee also provides contest participants with access to additional	15. Disputed that this is dependent upon the payment of an entry fee. Every
26	services, such as an online chat	visitor to the Derby Wars website has
27	feature, a leaderboard, a display of other	access to the leaderboards, a display of
	participants' selections, and a graphic	other participants' selections, and a
28	that displays how many people selected -12-	graphic that displays how many people

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1	each horse. Midland Dep. at 76:11-25, 125:2-127:13; Midland Decl. ¶ 15.	selected each horse, without paying an entry fee. Ellis Dec. Opp.to MSJ, ¶ 7.
2	12012 127110, 1711010110 2001    101	enal feet Ema Beet applied 1.120, 11 /1
3	16. In January 2015 (prior to filing this action), Stronach Group executive Scott	16. Disputed. Ellis Dec. Opp.to MSJ, ¶ 5, Exh. C, Deposition of Scott Daruty,
4	Daruty (a lawyer) referred to Derby	439:12-22; 440:16-441:12.
5	Wars' contests as non-pari-mutuel.	,
6	Daruty Dep. at 439:5-441:16.	
7	17. The contests consist of a number of	17. Undisputed.
	specified contest races (usually a minimum of six races in each contest) to	
8	be run at various horse racing tracks	
9	across the United States. Midland Dep. at	
10	151:25-152:12, 155:18-156:3;	
11	Midland Decl. ¶ 10.	
	18. Players entering a contest select one	18. Undisputed.
12	horse for each designated race in the contest, along with a backup if that	
13	horse scratches. Midland Decl. ¶ 10.	
14	19. After the race, Derby Wars computes	19. Undisputed.
15	a point score for each player's pick.	
	Midland Dep. at 134:6-135:20;	
16	Midland Decl. ¶ 12.  20. The points allocated to each player is	20. Disputed that the points are based on
17	based on one point per mythical dollar of	"mythical dollar[s]". The points are
18	payout at the track, subject to	based on the actual payouts at the track.
19	maximum caps set according to the	Ellis Dec. Opp. to MSJ, ¶ 3, Exh. A,
	contest's rules. Midland Dep. at	Deposition of Mark Midland, 135:21-24;
20	134:6-135:20; Midland Decl. ¶ 11. 21. After all races have been run, the	180:16-22. 21. Undisputed.
21	players with the highest point scores win	21. Olidisputed.
22	the prize. Midland Dep. at 175:11-	
23	176:10, 180:12-14; Midland Decl. ¶ 12.	
	22. Like the entry fees, the prizes	22. Undisputed.
24	awarded to the winner of each contest are	
25	set in advance and do not change. Midland Dep. at 192:17-193:14;	
26	Midland Decl. ¶ 14; Daruty Dep. at	
27	94:15-24.	
	23. The prizes are awarded to the player	23. Undisputed.
28	who achieves the highest score in the	

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1	game, and the prizes awarded are	
$_{2}$	the same regardless of the number of	
	points scored. Midland Dep. at 175:11-	
3	176:10, 180:12-14, 192:17-193:14;	
4	Midland Decl. ¶ 16.	
	24. The prize for each contest is not	24. Disputed. Derby Wars pays the
5	made up of monies collected from entry	prizes, and Derby Wars' only source of
6	fees paid by contest participants.	revenue is entry fees. Ellis Dec. Opp.to
	Midland Decl. ¶ 16.	MSJ, ¶ 4, Exh. B, Deposition of Mike
7		Shutty, 21:17-22.
8	25. There are three general formats of	25. Undisputed.
	Derby Wars' fantasy horse racing	
9	contests, each subject to contest	
10	rules: (i) Open, (ii) Lockdown, and (iii)	
,	Survivor. Midland Decl. ¶ 18.	
11	26. In Open contests, players can change	26. Undisputed.
12	their picks up until the race closes.	
12	Midland Dep. at 132:12-22; Midland	
13	Decl. ¶ 19.	
14	27. In Lockdown contests, players must	27. Undisputed.
15	make all of their selections before the	
13	start of the first race. Midland Dep. at	
16	132:23-25; Midland Decl. ¶ 20.	
17	28. Open and Lockdown contests	28. Undisputed.
	comprise the majority of contests run by	
18	Derby Wars. Midland Decl. ¶¶ 19-20.	
19	29. In the Survivor format, players must	29. Undisputed.
	pick a horse that finishes first, second or	
20	third in each race in order to advance to	
21	the next race. Midland Decl. ¶ 21.	20 11 12 4 1
	30. Predetermined prizes in Survivor	30. Undisputed.
22	contests are awarded to the players who	
23	survive to the end of the contest.	
	Midland Decl. ¶ 21.	21 D' 41 G 4 O' 4 V
24	31. Skill predominates over chance in	31. Disputed. See, Objections to Kanny
25	Derby Wars' contests. Kanny Decl. ¶ 6,	Decl., and to the excerpts of the Heeb
26	Ex. E (Expert Report of Randal Heeb,	Report. Further this is not a fact, but an
26	Ph.D. ("Heeb Rep.")) ¶¶ 1- 22.	unsupported opinion.
27	22 Daylor Warra daring 1 'to a set of	22 Diameted Minetal de de de de
28	32. Derby Wars designed its contests to	32. Disputed. Misstates the testimony.
40	maximize the skill required to win.	None of the cited deposition testimony

1	Midland Dep. at 21:12-22:8, 69:14-19,	supports that statement of fact. Midland
2	130:11-131:4, 136:22-137:4, 138:9- 139:20, 141:16- 25, 198:7- 199:14;	Decl., ¶ 22 states: "When we designed Derby Wars' contests, we designed them
3	Midland Decl. ¶ 22.	to involve a substantial amount of skill."
4	33. Derby Wars' contests involve intra-	33. Disputed. See, objections to Kanny
4	game strategy skills, where players may	Decl., and to the excerpts of the Heeb
5	adjust their selections to take best	Report. Further this is not a fact, but an
6	advantage of the relative probabilities of	unsupported opinion. That is not true in
	winning relative to the scores of their	Lockdown games, where picks are made
7	opponents. Heeb Rep. ¶¶ 14, 32-33.	all at once, such that there is no intra-
8		game strategy (see Derby Wars' Fact 27
		above).
9		
10	34. Derby Wars' contests also involve	34. Disputed. See, Objections to Kanny
11	the skill of anticipating the overall slate	Decl., and to the excerpts of the Heeb
	of races that is likely to yield a high or low scoring game, and to predict the	Report. Further this is not a fact, but an unsupported opinion.
12	score likely necessary to win. Heeb Rep.	unsupported opinion.
13	¶¶ 15, 34.	
14	35. Derby Wars' contests also involve	35. Disputed. See, Objections to Kanny
	the skill of evaluating opponents to	Decl., and to the excerpts of the Heeb
15	determine their tendencies and	Report. Further this is not a fact, but an
16	relative strengths and weaknesses.	unsupported opinion.
17	Heeb Rep. ¶¶ 16, 35.	
17	36. Winning outcomes in Derby Wars'	36. Disputed. See, Objections to Kanny
18	contests reflect the relative knowledge	Decl., and to the excerpts of the Heeb
19	and skill of the participants, and	Report. Further this is not a fact, but an
	participants earn points based on	unsupported opinion. Winning
20	accumulated statistical results of the	outcomes are determined by the results
21	performance of horses in multiple real world horse racing events, subject to	of the horse races, uncertain events in which the player has no control over the
22	proprietary caps. Heeb Report ¶¶ 10-22.	outcome. Ellis Dec. Opp.to MSJ, ¶ 3,
	proprietary cups. Heed Report       10 22.	Exh. A., Deposition of Mark Midland,
23		177:21-178:13; 211:5-17. Further, the
24		points are not based on statistical results,
		but instead the actual results of a real
25		sporting event. Ellis Dec. Opp.to MSJ, ¶
26		3, Exh. A., Deposition of Mark Midland,
27		180:16-181:21.
	37. Participating in – and winning –	37. Disputed. See, Objections to Kanny
28	Derby Wars' contests involves applying -15-	Decl., and to the excerpts of the Heeb
	I	

- 11		
1	a variety of skills, including knowledge	Report. Further this is not a fact, but an
2	of horse racing, knowledge of the horses in a given race, and the ability to	unsupported opinion. Winning is based on the outcome beyond the control (or
3	handicap performance of the horse based	influence) of the Player. Ellis Dec.
4	on a variety of factors such as weather,	Opp.to MSJ, ¶ 3, Exh. A., Deposition of
_	prior performance, the particular jockey	Mark Midland, 211:5-17; Deposition of
5	riding the track, and the track. Heeb	Shutty, 66:4-11.
6	Report ¶ 31.  38. Plaintiffs admit that the Interstate	38. Disputed. Mistates testimony of
7	Horse Racing Act applies only to pari-	Ritvo; and is contrary to terms of the
	mutuel wagers. Ritvo Dep. at 52:6-	Interstate Horseracing Act which is not
8	55:23, 66:1-12.	limited to pari-mutuel wagers. 15
9		U.S.C. §3002(3).
10	20. L. 1	20. 11. 11. 1. 1
11	39. Jockeys typically are engaged by	39. Undisputed.
	horse trainers to ride in races and work	
12	with many different trainers and ride different horses on any given day. Ritvo	
13	Dep. at 18:15-21:9, 22:17-23:9; Daruty	
	Dep. at 91:19-92:7.	
14	40. Bet America does not pay additional	40. Disputed. Bet America does not pay
15	compensation to Plaintiffs for use of their	additional compensation because it
16	tracks in Bet America's contests, because	already pays Plaintiffs for the use of
	there is not yet an established business	their races. Ellis Dec. Opp.to MSJ, ¶ 5,
17	model on contest play. Daruty Dep. at	Exh. C, Deposition of Scott Daruty,
18	42:10-45:22; 201:11-202:6.	43:23-44:21.
	41. Plaintiffs and Bet America currently	41. Disputed. Deposition of Scott
19	do not have a compensation model in	Daruty, 43:23-44:21.
20	place for use of Plaintiffs' tracks	
21	in Bet America contests. Daruty Dep. at	
<u> </u>	354:8-21.	
22	42. Horse Tourneys, a pure contest site	42. Disputed. Horse Tourneys is
23	that does not offer ADW pari-mutuel	licensed as an ADW. Deposition of
	wagering, operates contests using	Scott Daruty, 228:8-15.
24	Plaintiffs' tracks without any payment to	
25	Plaintiffs. Daruty Dep. at 38:9-39:3,	
	248:4-254:6, 262:12-264:11.	42 Disputed See Objection to
26	43. ADW licenses issued by the NDRC	43. Disputed. See, Objection to Declaration of Mark Midland. This
27	do not cover fantasy horse racing contests, as NDRC does not treat	statement is without foundation and is
28	contests as pari-mutuel wagering.	speculation.
20	-16-	speculation.

#### Case 2:15-cv-09332-SJO-JEM Document 68-2 Filed 04/03/17 Page 17 of 29 Page ID #:1111 Midland Decl. ¶ 53. -17-PLAINTIFFS' STATEMENT OF GENUINE DISPUTES OF MATERIAL FACTS

# C. Defendant's Claimed Undisputed Facts Allegedly Demonstrating That Plaintiffs' IHA Claim Is Barred By The Statute Of Limitations

DEFENDANT'S FACTS AND	PLAINTIFFS' RESPONSE
EVIDENCE	
44. Beginning as early as September	44. Undisputed.
2011, Stronach Group executives	-
communicated with HRL's Mark	
Midland about potentially doing business	
together. Daruty Dep. at 141:14-147:22,	
148:5-150:19, 152:16-154:16, 155:10-	
156:17, 156:23-158:15, 159:12-160:5,	
160:10-161:24, 164:11-167:10, 168:5-	
170:7, 171:3-24, 172:4-173:19, 189:21-	
194:3; Rogers Dep. at 112:12-113:25,	
115:17-117:21, 118:8-119:22, 121:8-	
125:4, 126:8-12, 128:24-134:2, 135:13-	
23, 138:6-141:9, 144:2-146:16, 147:23-	
151:5, 152:20-153:1, 162:4-164:19,	
164:23-165:17, 166:23-167:7; Midland	
Decl. ¶¶ 26-27; Gierl Decl. ¶¶ 4-13, 21,	
Exs. C-O, T.	
45. In the fall of 2011, Stronach Group	45. Disputed. There is no evidence of
executives communicated with each	any such communications concerning
other and with Mr. Midland regarding the	doing business with Derby Wars. For
potential of doing business with HRL	purposes of the deposition cited by
and Derby Wars. Daruty Dep. at 141:14-	Defendant, counsel for Defendant
147:22, 148:5-150:19, 152:16-154:16,	defined the term "Derby Wars" as
155:10-156:17, 156:23-158:15, 159:12-	Defendant Horse Racing Labs. Ellis
160:5, 160:10-161:24, 164:11-167:10,	Dec. Opp.to MSJ, ¶ 5, Exh. C,
168:5-170:7, 171:3-24; Rogers Dep. at	Deposition of Scott Daruty, 11:25-12:8;
112:12-113:25, 115:17-117:21, 118:8- 119:22, 121:8-125:4, 126:8-12; Gierl	395:13-21. Horse Racing Labs in actuality includes two separate
Decl. ¶¶ 4-10, Exs. C-I.	Companies, Horse Racing Nation and
Deel.       4-10, Eas. C-1.	Derby Wars. Ellis Dec. Opp.to MSJ, ¶ 5,
	Exh. C, Deposition of Scott Daruty,
	395:13-21. There is no evidence of
	any communications regarding doing
	business with Derby Wars, the separate
	entity; this only relates to doing business

1		with Horse Racing Nation, which counsel for Defendant redefined as
2		Derby Wars for purposes of the
3		deposition only.
4		-
5	46. In September 2011, Mike Calderone	46. Undisputed.
	(the then-Chief Marketing Officer of the Stronach Group) referred to HRL in an e-	
6	mail to Stronach Group executives as an	
7	up-and-coming website. Daruty Dep. at	
8	141:14-145:5; Rogers Dep. at 112:12-	
9	113:25, 115:17-117:21; Gierl Decl. ¶ 4, Ex. C.	
10	T, LA. C.	
	47. In October 2011, Mr. Calderone	47. Disputed. For purposes of the
11	wrote an e-mail to Mr. Midland (copying	deposition cited by Defendant, counsel
12	Scott Daruty) inviting Mr. Midland to follow up on a discussion they had	for Defendant defined the term "Derby Wars" as Defendant Horse Racing Labs.
13	regarding using Derby Wars in a joint	Ellis Dec. Opp.to MSJ, ¶ 5, Exh. C,
14	venture program. Daruty Dep. at 148:5-	Deposition of Scott Daruty, 11:25-12:8;
15	150:19; Midland Decl. ¶ 31; Gierl Decl. ¶	395:13-21. Horse Racing Labs in
	6, Ex. E.	actuality includes two separate Companies, Horse Racing Nation and
16   17		Derby Wars. Ellis Dec. Opp.to MSJ, ¶ 5,
18		Exh. C, Deposition of Scott Daruty, 395:13-21. There is no evidence of
		any communications regarding using
19		Derby Wars, the separate entity, in a
20		joint venture program.
21	48. In fall 2011 through November 2012,	48. Disputed. Calderone has never been
22	Mr. Midland had numerous discussions	affiliated with any Plaintiff, nor had any
23	with Mr. Calderone about Derby Wars' pay-to-play contests, the fact that those	authority to act on behalf of any Plaintiff. Declaration of Mike Rogers,
24	contests use the results of horse races run	¶¶3.
	at Plaintiffs' tracks, and how Derby Wars	
25	could integrate, cross promote and	
26	partner the Stronach Group properties, including Plaintiffs' race tracks.	
27	Midland Decl. ¶¶ 27-37.	
28	49. In December 2011, in an e-mail to	49. Disputed. The cited evidence does
	-19-	

1	Stronach Group executives, including	not even discuss implementing Derby
$_{2}$	Mr. Rogers, Mr. Calderone proposed to	Wars' contests across Plaintiffs' tracks.
2	implement Derby Wars' contests across	
3	the Stronach properties, including	
4	Plaintiffs' tracks. Daruty Dep. at 160:20-161:24; Gierl Decl. ¶ 9, Ex. H.	
5	50. Mr. Calderone "spoke very highly" of	50. Disputed. The cited testimony does
	Mr. Midland to Mr. Rogers and was a	not discuss Plaintiffs entering into an
6	proponent of Plaintiffs entering into an	arrangement with Horse Racing Nation
7	arrangement with either Horse Racing	or Derby Wars.
8	Nation or Derby Wars. Rogers Dep. at	
	115:9-15.	
9	51. Mr. Calderone and Mr. Rogers had	51. Disputed. The cited evidence does
10	discussed on numerous occasions the	not reflect any discussion of investing in
11	possibility of investing in or acquiring Derby Wars. Rogers Dep. at 121:8-	or acquiring Derby Wars. Ellis Dec. Opp.to MSJ, ¶ 6, Exh. D, Deposition of
	125:4, 135:13-23, 137:17-138:5, 152:13-	Mike Rogers, 120:25-121:3.
12	153:1; Gierl Decl. ¶ 19, Ex. R.	1711Ke Rogers, 120.23 121.3.
13	52. In October 2012, Mr. Calderone sent	52. Disputed. The cited evidence does
14	an e-mail to senior officers of the	not reflect any such promotion.
	Stronach Group about a business	
15	relationship with HRL, in which Mr.	
16	Calderone promoted an investment in	
17	HRL if Derby Wars would agree to	
	provide (among other things) free versions of its contests. Daruty Dep. at	
18	168:5-170:7, 171:3-24, 172:4-11; Rogers	
19	Dep. at 138:6-141:4; Gierl Decl. ¶ 11,	
20	Ex. J.	
21	53. In response to Mr. Calderone's	53. Disputed. The cited evidence does
21	October 2012 email, Mr. Rogers and Mr.	not support the fact concerning Derby
22	Calderone discussed the opportunity with	Wars. For purposes of the deposition
23	Derby Wars. Daruty Dep. at 172:4-173:19; Rogers Dep. at 138:6-143:13,	cited by Defendant, counsel for
24	175.19, Rogers Dep. at 156.0-145.15,	Defendant defined the term "Derby Wars" as Defendant Horse Racing Labs.
	170.13 177.22.	Ellis Dec. Opp.to MSJ, ¶ 5, Exh. C,
25		Deposition of Scott Daruty, 11:25-12:8;
26		395:13-21. Horse Racing Labs in
27		actuality includes two separate
		Companies, Horse Racing Nation and
28	-20-	Derby Wars. Ellis Dec. Opp.to MSJ, ¶ 5,

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1		Exh. C, Deposition of Scott Daruty,
2		395:13-21. There is no evidence of
3		any communications regarding Derby Wars, the separate entity. Ellis Dec.
		Opp.to MSJ, ¶ 6, Exh. D, Deposition of
4		Mike Rogers, 120:25-121:3.
5	54. Mr. Midland met with Mr. Rogers in	54. Undisputed.
6	person at the Breeders' Cup on or about	
7	November 2, 2012. Midland Decl. ¶ 36; Rogers Dep. at 148:1-150:13.	
8	55. At the meeting with Mr. Rogers at	55. Disputed. Declaration of Mike
	the Breeder's Cup on or about November	Rogers, ¶¶4-6.
9	2, 2012, Mr. Midland visually showed	
10	Derby Wars' pay-to-play fantasy horse racing contests to Mr. Rogers on Mr.	
11	Midland's iPad, which involved races	
12	run at Plaintiffs' tracks. While Mr.	
13	Rogers watched, Mr. Midland clicked through the website pages and explained	
14	to and showed Mr. Rogers the pay-to-	
	play contests and specifically including	
15	contests with races run at Plaintiffs'	
16	tracks, including Santa Anita. Midland Decl. ¶ 36; Rogers Dep. at 1481-150:13.	
17	Deci.    30, Rogers Dep. at 1401-130.13.	
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	DI AINTIEES' STATEMENT O	E GENLINE DISPLITES OF MATERIAL FACTS

# D. Defendant's Claimed Undisputed Facts Allegedly Demonstrating That Plaintiffs' Claims Are Barred By The Equitable Doctrines Of Estoppel And Waiver

DEFENDANT'S FACTS AND	PLAINTIFFS' RESPONSE
EVIDENCE	
44. Beginning as early as September	44. Undisputed.
2011, Stronach Group executives	
communicated with HRL's Mark	
Midland about potentially doing business	
together. Daruty Dep. at 141:14-147:22,	
148:5-150:19, 152:16-154:16, 155:10-	
156:17, 156:23-158:15, 159:12-160:5,	
160:10-161:24, 164:11-167:10, 168:5-	
170:7, 171:3-24, 172:4-173:19, 189:21-	
194:3; Rogers Dep. at 112:12-113:25,	
115:17-117:21, 118:8-119:22, 121:8-	
125:4, 126:8-12, 128:24-134:2, 135:13-	
23, 138:6-141:9, 144:2-146:16, 147:23-	
151:5, 152:20-153:1, 162:4-164:19,	
164:23-165:17, 166:23-167:7; Midland	
Decl. ¶¶ 26-27; Gierl Decl. ¶¶ 4-13, 21,	
Exs. C-O, T.	
45. In the fall of 2011, Stronach Group	45. Disputed. There is no evidence of
executives communicated with each	any such communications concerning
other and with Mr. Midland regarding the	doing business with Derby Wars. For
potential of doing business with HRL	purposes of the deposition cited by
and Derby Wars. Daruty Dep. at 141:14-	Defendant, counsel for Defendant
147:22, 148:5-150:19, 152:16-154:16,	defined the term "Derby Wars" as
155:10-156:17, 156:23-158:15, 159:12-	Defendant Horse Racing Labs. Ellis
160:5, 160:10-161:24, 164:11-167:10,	Dec. Opp.to MSJ, ¶ 5, Exh. C,
168:5-170:7, 171:3-24; Rogers Dep. at	Deposition of Scott Daruty, 11:25-12:8;
112:12-113:25, 115:17-117:21, 118:8-	395:13-21. Horse Racing Labs in
119:22, 121:8-125:4, 126:8-12; Gierl	actuality includes two separate
Decl. ¶¶ 4-10, Exs. C-I.	Companies, Horse Racing Nation and
	Derby Wars. Ellis Dec. Opp.to MSJ, ¶ 5,
	Exh. C, Deposition of Scott Daruty,
	395:13-21. There is no evidence of
	any communications regarding doing
	business with Derby Wars, the separate

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1		entity; this only relates to doing business with Horse Racing Nation, which
2		counsel for Defendant redefined as
3		Derby Wars for purposes of the
4		deposition only.
5	46. In September 2011, Mike Calderone	46. Undisputed.
6	(the then-Chief Marketing Officer of the	
7	Stronach Group) referred to HRL in an e- mail to Stronach Group executives as an	
8	up-and-coming website. Daruty Dep. at	
9	141:14-145:5; Rogers Dep. at 112:12-	
10	113:25, 115:17-117:21; Gierl Decl. ¶ 4, Ex. C.	
11	47. In October 2011, Mr. Calderone	47. Disputed. For purposes of the
12	wrote an e-mail to Mr. Midland (copying	deposition cited by Defendant, counsel
13	Scott Daruty) inviting Mr. Midland to	for Defendant defined the term "Derby
	follow up on a discussion they had regarding using Derby Wars in a joint	Wars" as Defendant Horse Racing Labs. Ellis Dec. Opp.to MSJ, ¶ 5, Exh. C,
14	venture program. Daruty Dep. at 148:5-	Deposition of Scott Daruty, 11:25-12:8;
15	150:19; Midland Decl. ¶ 31; Gierl Decl. ¶	395:13-21. Horse Racing Labs in
16	6, Ex. E.	actuality includes two separate Companies, Horse Racing Nation and
17		Derby Wars. Ellis Dec. Opp.to MSJ, ¶ 5,
18		Exh. C, Deposition of Scott Daruty,
19		395:13-21. There is no evidence of any communications regarding using
20		Derby Wars, the separate entity, in a
21		joint venture program.
22	48. In fall 2011 through November 2012,	48. Disputed. Calderone has never been
23	Mr. Midland had numerous discussions with Mr. Calderone about Derby Wars'	affiliated with any Plaintiff, nor had any authority to act on behalf of any
24	pay-to-play contests, the fact that those	Plaintiff. Declaration of Mike Rogers,
25	contests use the results of horse races run at Plaintiffs' tracks, and how Derby Wars	¶¶3.
26	could integrate, cross promote and	
27	partner the Stronach Group properties, including Plaintiffs' race tracks.	
28	Midland Decl. ¶¶ 27-37.	
	-23-	

1	40 In December 2011 in an empire	10 Diameted The sited socidence date
1	49. In December 2011, in an e-mail to	49. Disputed. The cited evidence does
2	Stronach Group executives, including	not even discuss implementing Derby
	Mr. Rogers, Mr. Calderone proposed to	Wars' contests across Plaintiffs' tracks.
3	implement Derby Wars' contests across	
4	the Stronach properties, including	
	Plaintiffs' tracks. Daruty Dep. at	
5	160:20-161:24; Gierl Decl. ¶ 9, Ex. H.	
6	50. Mr. Calderone "spoke very highly" of	50. Disputed. The cited testimony does
	Mr. Midland to Mr. Rogers and was a	not discuss Plaintiffs entering into an
7	proponent of Plaintiffs entering into an	arrangement with Horse Racing Nation
8	arrangement with either Horse Racing	or Derby Wars.
	Nation or Derby Wars. Rogers Dep. at	
9	115:9-15.	
10	51. Mr. Calderone and Mr. Rogers had	51. Disputed. The cited evidence does
10	discussed on numerous occasions the	not reflect any discussion of investing in
11	possibility of investing in or acquiring	or acquiring Derby Wars. Ellis Dec.
12	Derby Wars. Rogers Dep. at 121:8-	Opp.to MSJ, ¶ 6, Exh. D, Deposition of
	125:4, 135:13-23, 137:17-138:5, 152:13-	Mike Rogers, 120:25-121:3.
13	153:1; Gierl Decl. ¶ 19, Ex. R.	
14	"	72 D' ( 1 T) '( 1 '1 1
	52. In October 2012, Mr. Calderone sent	52. Disputed. The cited evidence does
15	an e-mail to senior officers of the	not reflect any such promotion.
16	Stronach Group about a business	
10	relationship with HRL, in which Mr.	
17	Calderone promoted an investment in	
18	HRL if Derby Wars would agree to	
10	provide (among other things) free	
19	versions of its contests. Daruty Dep. at	
20	168:5-170:7, 171:3-24, 172:4-11; Rogers	
20	Dep. at 138:6-141:4; Gierl Decl. ¶ 11,	
21	Ex. J.	
22	53. In response to Mr. Calderone's	53. Disputed. The cited evidence does
22	October 2012 email, Mr. Rogers and Mr.	not support the fact concerning Derby
23	Calderone discussed the opportunity with	Wars. For purposes of the deposition
$_{24} \parallel$	Derby Wars. Daruty Dep. at 172:4-	cited by Defendant, counsel for
24	173:19; Rogers Dep. at 138:6-143:13,	Defendant defined the term "Derby
25	146:13-147:22.	Wars" as Defendant Horse Racing Labs.
26		Ellis Dec. Opp.to MSJ, ¶ 5, Exh. C,
26		Deposition of Scott Daruty, 11:25-12:8;
27		395:13-21. Horse Racing Labs in
<u>,                                    </u>		actuality includes two separate
28	24	Companies, Horse Racing Nation and
	<del>-//+-</del>	

## Case 2:15-cv-09332-SJO-JEM Document 68-2 Filed 04/03/17 Page 25 of 29 Page ID #:1119

	Derby Wars. Ellis Dec. Opp.to MSJ, ¶ 5,
	Exh. C, Deposition of Scott Daruty,
	395:13-21. There is no evidence of
	any communications regarding Derby
.	Wars, the separate entity. Ellis Dec.
	Opp.to MSJ, ¶ 6, Exh. D, Deposition of
	Mike Rogers, 120:25-121:3.
54. Mr. Midland met with Mr. Rogers in	54. Undisputed.
person at the Breeders' Cup on or about	
Dogges Don et 149.1 150.12	
Rogers Dep. at 148:1-150:13.	55 Disputed Declaration of Miles
55. At the meeting with Mr. Rogers at the Breeder's Cup on or about November	55. Disputed. Declaration of Mike
2 2012 Mr. Midland and an invalidation of	Rogers, ¶¶4-6.
2, 2012, Mr. Midland visually showed	
Derby Wars' pay-to-play fantasy horse racing contests to Mr. Rogers on Mr.	
M' 11 - 12 'D 1 - 1' 1 ' - 1 - 1 - 1 - 1 - 1	
run at Plaintiffs' tracks. While Mr.	
Rogers watched, Mr. Midland clicked	
Rogers watched, Wir. Wildrand Cheked	
to and showed Mr. Rogers the pay-to-	
play contests and specifically including	
[]	
tracks, including Santa Anita. Midland	
Decl. ¶ 36; Rogers Dep. at 1481-150:13.	
56 In Ivan 2012 Ma Midland	56 Undiameted
56. In June 2013, Mr. Midland	56. Undisputed.
communicated directly to Michael	
Nyman, marketing director at Gulfstream Park (one of Plaintiffs' tracks), about	
running handicapping contests for	
Gulfstream on the Derby Wars website.	
Daruty Dep. at 172:4-173:19; Ritvo Dep.	
122:16-124:18; Midland Decl. ¶ 38;	
Gierl Decl. ¶ 12, Ex. K.	
57. In the fall of 2014, Mr. Midland had	57. Disputed. For purposes of the
several conversation with Nate Newby,	Daruty deposition cited by Defendant,
marketing director of Santa Anita, about	counsel for Defendant defined the term
doing a joint sponsorship deal that would	"Derby Wars" as Defendant Horse
promote Derby Wars to Santa Anita	Racing Labs. Ellis Dec. Opp.to MSJ, ¶
customers. Midland Decl. ¶ 39; Daruty	5, Exh. C, Deposition of Scott Daruty,
DV A Description of the second	c, 2.m. c, Deposition of Scott Buildy,

	Case 2:15-cv-09332-SJO-JEM Document 68-2 Filed 04/03/17 Page 26 of 29 Page ID #:1120		
1	Dep. at 393:11-395:2, 396:4-399:12;	11:25-12:8; 395:13-21. The cited Rogers	
2	Rogers Dep. at 159:25-160:8, 162:2-164:19.	testimony does not support the assertion that "In the fall of 2014, Mr. Midland	
3	104.17.	had several conversation with Nate	
4		Newby, marketing director of Santa Anita, about doing a joint sponsorship	
5		deal that would promote Derby Wars to Santa Anita customers."	
6		Santa Ainta customers.	
7	58. As part of a joint partnership	58. Disputed. The evidence proffered	
8	agreement, Santa Anita delivered literally thousands of e-mails to its customers	does not support the assertions that "Santa Anita delivered literally thousands	
9	promoting Derby Wars, including an e-	of emails" or that Santa Anita sent an	
10	mail to over 10,000 customers in November 2015. Midland Decl. ¶ 43,	email to over 10,000 customers.	
12	Exs. E, F; Daruty Dep. at 247:14-248:3; 393:11-395:2, 396:4-399:12.		
13	59. In November 2015, Mr. Midland	59. Undisputed.	
14	communicated with Sal Sinatra, marketing director at Laurel Park		
15	(another of Plaintiffs' tracks), about		
16	Derby Wars offering handicapping contests. Midland Decl. ¶ 46; Ritvo Dep.		
17	at 135:18-138:19; Gierl Decl. ¶ 20, Ex. S.		
18	60. In late November 2015, Mr. Midland sent an e-mail to Mr. Rogers, seeking to	60. Undisputed.	
19	expand the Santa Anita relationship.		
20	Midland Decl. ¶ 47, 61. Prior to filing the lawsuit, Stronach	61. Undisputed.	
21	Group executives never once wrote to,		
22	spoke to or met with Derby Wars objecting to the use of, or demanding that		
23	Derby Wars stop using, Plaintiffs' tracks		
24	in Derby Wars' fantasy horse racing contests. Midland Decl. ¶ 48; Daruty		
25	Dep. at 181:25-183:11, 185:23-186:2,		
26	209:24-210:9; Rogers Dep. at 173:1- 174:20, 179:12-180:15, 184:12-25,		
27	198:22-200:25; Gierl Decl. ¶ 14, Ex. M.		
28	62. Stronach executives claim that the	62. Disputed. The only executive who	

62. Disputed. The only executive who

62. Stronach executives claim that the

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1 2 3	"light bulb" went off about Derby Wars' use of their content in fantasy contests around October 2014, and began to investigate a claim. Rogers Dep. at	stated that was Mike Rogers.	
4	160:6-161:2, 171:5-19. 63. No one from the Stronach Group	63. Undisputed.	
5	asked Derby Wars to stop using		
6	Plaintiffs' tracks in Derby Wars' contests at any time prior to the lawsuit		
7	being filed. Daruty Dep. at 181:25-82:21,		
8	183:7-11, 185:23-186:2; Ritvo Dep. at		
9	145:6-14; Rogers Dep. at 173:1-174:17, 179:12-180:15, 184:12-25, 192:12-19,		
10	195:7-19, 198:22-200:16; Gierl Decl. ¶		
11	14, Ex. M.		
	64. Several fantasy horse racing contest sites using Plaintiffs' races in their	64. Disputed. Bet America does pay Plaintiffs for the use of their races. Ellis	
12	contests, including Bet America and	Dec. Opp.to MSJ, ¶ 5, Exh. C,	
13	Horse Tourneys, without payment to	Deposition of Scott Daruty, 43:23-44:21.	
14	Plaintiffs. Daruty Dep. at 37:12-39:3.  65. A few months after this lawsuit was	65 Disputed See Objection to	
15	filed, Horse Tourneys became licensed	65. Disputed. See Objection to Declaration of Mark Midland.	
16	for the first time as an ADW in North		
17	Dakota, even though it does not operate as an ADW, and even though it has run a		
18	contest site for years. Midland Decl. ¶		
19	54, Ex. K.		
20 21			
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	PLAINTIFFS' STATEMENT OF GENUINE DISPUTES OF MATERIAL FACTS		

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#### The Court Should Abstain From Adjudicating Plaintiffs' Claims, In Deference **To Legislative Function**

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4		
5	DEFENDANT'S FACTS AND EVIDENCE	PLAINTIFFS' RESPONSE
6	66. Plaintiffs routinely engage in	66. Disputed. Cited evidence does not
7	lobbying activities, including, for	support fact, and there is no evidence
8	example, before state legislatures and	that Plaintiffs routinely engage in
	Racing Boards and Commissions. Daruty Dep. at 109:6-113:16; Rogers Dep. at	lobbying activities.
9	48:1-12.	
10	67. New York, Massachusetts, Virginia,	67. Undisputed that various states have
11	Tennessee, Mississippi, Indiana,	enacted legislation to regulate DFS, but
	Missouri, Kansas, and Colorado have all	disputed that any state has ever
12	successfully enacted legislation to	approved DFS based on the results of
13	regulate daily fantasy sports ("DFS").  Midland Decl. ¶ 56; Kanny Decl. ¶ 8;	horse races. In particular, Indiana and New York's legislation excludes DFS
14	Colo. Rev. Stat. § 12-15.5-105; Kan.	based on the results of horse races from
15	Stat. § 21-6403; Miss. Code. § 97-33-	the legislation. See, N.Y. Rac. Pari-
	305; Tenn. Code § 47-18-1611; Ind.	Mut. Wag. & Breed. Law § § 1401 (7)
16	Code § 4-33-24-1; Va. Code § 59.1- 569;	(15), 1402, 1404 (1) (r), Ind. Code § 4-
17	N.Y. Rac. Pari-Mut. Wag. & Breed. Law § 1411; 940 Mass. Code Regs. 34.	33-24-9.
18	68. New York and Indiana have enacted	68. Disputed that the legislation
19	legislation to regulate DFS with respect	"regulates" DFS related to horse racing
	to horse racing contests. Midland Decl. ¶	contests. The Indiana legislation
20	56; Kanny Decl. ¶ 8.	expressly excludes DFS based on the
21		results of horse races and the New York
22		legislation contains language barring horse-racing fantasy contests despite
23		explicitly authorizing the contests on
24		nearly all other sports. (See, N.Y. Rac. Pari-Mut. Wag. & Breed. Law § § 1401
25		(7) (15), 1402, 1404 (1) (r), Ind. Code §
		4-33-24-9.) As a result, Derby Wars
26		does not accept players from New York
27		or Indiana. Ellis Dec. Opp.to MSJ, ¶ 8, Exh. E.
28	69. There are ongoing efforts to enact	69. Disputed that the efforts are
	-20-	57. 2 15pares and and only are

PLAINTIFFS' STATEMENT OF GENUINE DISPUTES OF MATERIAL FACTS

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1	DFS legislation in at least fifteen states,	"ongoing."
2	including in Florida and Oregon. Kanny Decl. ¶ 8.	
3	70. California has considered whether to	70. Disputed. The cited evidence does
4	regulate fantasy contests, and Plaintiffs	not support any efforts by Plaintiffs to
5	have been involved in those efforts.  Daruty Dep. at 108:4-111:6; Midland	regulate fantasy contests.
6	Decl. ¶ 56.  71. Before Plaintiffs filed this action,	71. Disputed. The cited evidence does
7	there was a "public debate" at a	not reflect debate regarding CHRB's
8	California Horse Racing Board ("CHRB") meeting regarding the	treatment of DFS and handicapping contests.
9	CHRB's treatment of DFS and	concests.
10	handicapping contests. Daruty Dep. at	
11	187:20-188:15.	
12		
13	DATED: April 3, 2017	CORBETT, STEELMAN & SPECTER A Professional Law Corporation
14		
15		By: /s/ Richard B. Specter
16		By: /s/ Richard B. Specter Richard B. Specter Attorneys for PLAINTIFFS
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	PLAINTIFFS' STATEMENT O	F GENUINE DISPUTES OF MATERIAL FACTS